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The Impact of the Bank's Internal Rules on the Transparency of the Banking Activity

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Abstract

Though the banking law is considered a law of professionals, its profound impact over the social life determines the necessity of making the banking system more accessible for the customers. Regarding the relations between a bank and its clientele, this desideratum could be translated by the imperative growth of the transparency in the banking activity.
The judicial practice is plentiful in litigations and controversies caused by the lack of transparency in the banking activity. In this context, the competent authorities, both national, as well as international, have started a process to increase the transparency of certain banking transactions.
The internal rules of the banks, having a confidential feature, though it should have only the role to organize the banking activity, often reach to determine, in a substantial, but indirect manner, the content of the banking activities. Thus the transparency of the aimed operations is affected, leading to situations in which the clients are imposed contract clauses on that they were not informed. In order to regain the trust of the clientele, the banks must quit using internal regulations as means of controlling, from the shadows, the contractual results.

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Keywords: transparency; banking operations; internal rules; abusive clauses; banking clients

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Introduction

Credit institutions, generically called banks, have an important economic and social role in the contemporary period. Although initially they appeared to be a partner of the natural or legal person, in its evolution, to a closer look, the bank cannot hide its superiority which results from its professional capacity. This is found in the adhesion contracts that the bank is submitting to its potential clients, contracts that proved to be dangerous due to their hidden traps, although not forbidden by law.

1. Bank General Conditions

Starting from premise that, in law, the contract is the law of parties, the central bank, the National Bank of Romania [BNR], which validates the crediting rules, shall not intervene in the activity of banks in this regard. Pursuant to art. 3 para. 1 from the BNR Regulation no. 3/2007 regarding limitation of credit risks for the credits intended to natural persons, the loaners perform the crediting activity based on their own regulations, previously validated by the National Bank of Romania. The fact that such crediting rules are not made public by banks made the transparency of crediting operations call into question. Moreover, such situation created the premise of making some serious accusations addressed to banks, suspected of hiding some "rules disfavouring the borrowers" (Piperea, 2014).

BNR does not intervene on the models of contracts drafted by banks based on rules, it only intervenes when "banks break what they have signed" (Vasilescu, 2014).

The own rules of credit institutions are "mandatory in the banking activity, are secret and not public, the clients are presented only a part in order to express their competent agreement regarding the obligations assumed. They only represent (...) their own working conditions" (Postolache, 2012).

However, sometimes some bank rules, known as bank general conditions, acquire less known or accessible valences to the bank product consumer. Thus, we find that the phrase "contracting document", used by the Lawmaker in the Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital adequacy, "subsumes any document including the rules applicable to such contract (including the instrumentum ascertaining the end of the banking contract and the bank general conditions related to it)" (Bercea, 2014). It is considered that "being established unilaterally and discretionary by the bank, as the professional party of the contract, the general banking conditions express, beyond doubt, the will of the bank as to the effects to be granted to a certain type of banking contract" (Motica & Bercea, 2007) that is why, the specialised doctrine also rightfully appreciates (Bercea, 2014) that the main contracting document should include a clause referring to the general conditions.

In order to be opposable against parties, the bank general conditions and the internal rules applicable to that contract should be notified to the client. For a valid contract conclusion, the client should give an informed consent regarding the contents and the effects of the banking contract. The doctrine accurately appreciates that "in order to accomplish this condition, the bank should accomplish its obligation to notify" (Aniţei & Lazăr, 2011). This obligation supposes to notify the client about all banking contract conditions, about all mutual agreements of the parties (Aniţei & Lazăr, 2011).

The notification is performed differently in case of documents issued upon the conclusion of the contract or of documents non-issued upon the conclusion of the contract. In case of the latter ones, they should be placed at the client's disposal to be consulted and become opposable by "accomplishing certain conditions assuring the surety of the informed agreement expressed by the client against the clauses included in the document" (Bercea, 2014).

2. Abusive clauses in banking contracts

At present, one of the most frequent problems of the bank is the problem of lawsuits opened and brought against it for abusive contracting clauses.

The competent authorities for consumer protection play an important part in appreciating banking contract clauses as abusive. This aspect is more and more obvious while the bank crediting rules do not go to the BNR regulation department, they go to BNR supervision department. BNR specified by means of its representatives that starting with December 2013, it "shall no longer validate those crediting rules of commercial banks, it shall use on-

site supervision and take measures, if necessary, to modify the internal bank rules" (Păunescu, 2014).

Pursuant to Law no. 193/200 regarding abusive clauses from the contracts concluded between professionals and consumers[1], as modified by art. 38 from Law no. 76/2012 to apply Law no. 134/2010 regarding the Civil procedure code[2], ANPC [Consumer Protection National Authority] can sue at law the professional who uses adhesion contracts containing abusive clauses, requesting the court of law to decide the cessation of its use, and the modification of the on-going contracts by removing the abusive clauses. Article 12 para. 4 from Law no. 193/2000, thus modified, points out the fact that these prerogatives specific to consumer protection associations approved by law "does not jeopardize the right of the consumer to whom the adhesion contract containing abusive clauses is opposed, the right to invoke the nullity of the clause in action or in exception, according to the law".

3. The lack of transparency of the bank operations referring to internal rules

Clauses can be abusive under many aspects. In this study, we are interested to what extent the bank internal rules carry the abusive character of clauses.

We mentioned above that these rules, the bank general conditions, are opposable against the client only if the client is notified about them. The validity of such clauses is appreciated subject to the compliance of some criteria, such as: visibility, legibility or comprehensibility. In our opinion, all these criteria ensure the transparency of the carried bank operation.

Thus, we consider as arguable the legal value of the spontaneous display by which they modify the banking contract clauses "as it is not certain that the new information was notified to the client" (Bercea, 2014). That is why such a clause can be qualified from the perspective of the consumption law as being non-negotiated and, as a consequence, abusive (Bercea, 2014).

Relatively recently, following a control performed by competent European authorities over the information supplied by the Romanian banks on-line on their web pages, they noticed their lack of transparency regarding the financial products offered by them. Relying on the directive regarding the consumption credit, transposed in the national legislation by the Government Emergency Ordinance no. 50/2010, the authorities who performed the investigation stated that those banks were using offers omitting essential information for decision taking or had some costs deceitfully presented (Popa, 2014).

Banking contracts also lack the transparency that should be specific to bank operations. For example, in some credit contracts that are object to some law suits on the deck of some courts of law, the clause regarding interests is considered to be abusive due to lack of transparency, because the interest is nor clearly established. Although it is considered a fix interest during the whole contract, the bank assumes the prerogative to unilaterally modify the interest rate, according to the economic situation. In other words, "the interest should be a fix one, but it becomes variable by the unilateral will of the bank".

Also, they consider abusive the clauses by which the bank reserves the possibility to unilaterally modify the quantum of some bank fees, applying some internal rules to establish them, rules that are not notified to the client.

Due to all these, the Bucharest Tribunal, Civil Section VI, issued on 30 January 2014 and irrevocably decided as abusive the granting fees and the administration fees from a credit contract concluded between two clients and a bank (Voinea, 2014). Similarly, the Bucharest Tribunal irrevocably decided on 29 January 2014 that the unilateral modification of the interest rate and the risk fee perceived by the bank are abusive (Buscu, 2014).

Conclusions

All these aspects are the object of regulating some internal rules which often become "contracting documents". Their lack of transparency obviously affects the consumer's will for bank products, allowing the intervention of the Consumer Protection National Authority to hold responsible the bank suspected of including some abusive clauses

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[1] Published in Official Journal no.560 on 10 November 2000, republished in Official Journal no.543 on 3 August 2012

[2] Published in Official Journal no. 365 on 30 May 2012

in the contract.

At present, due to the great number of legal disputes in which they were accused of having included abusive clauses in the contracts, the banks are pursuing a powerful rehabilitation policy in front of their clients whose demands became bigger. The new technologies are also used in this regard. Thus, the bank products search and contrastive analysis engines appeared. They say that "these platforms only bring the bank offers to the client so that the client can choose according to the features offering him/her advantages. At the same time, the client expects the offer to be presented clearly and coherently; transparency does not mean being intoxicated with information that the client could not understand and would perceive it as more and more complicated (Oprescu, *apud* Ardelean, accessed 2014).

Of course, the banks and their operating mode will become more transparent, only to the extent that they will wish for that to happen. The authorities aimed to protect the bank products consumers have now in hand the legal means to force the banks to act in this regard.

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